BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DELTA GILMORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 170,188
SWIFT-ECKRICH, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requests review of the Award of Administrative Law Judge Robert H. Foerschler entered in this proceeding on November 17, 1994.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. The respondent, a qualified self-insured, appeared by its attorney, Mark E. Kolich of Kansas City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a ten percent (10%) functional impairment. The Administrative Law Judge found that claimant had returned to work for the respondent at a comparable wage and, therefore, applied the presumption of no work disability contained in K.S.A. 44-510e. The claimant requested the Appeals Board to review the finding of nature and extent of disability. That is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified to award claimant permanent partial disability benefits based upon a work disability.

Claimant is sixty (60) years old and has worked for the respondent for twelve (12) years. Claimant has completed the tenth grade and prior to her employment with the respondent worked as a toll booth operator and waitress. On September 1, 1992, claimant injured herself while at work when her chair broke and she fell to the concrete floor. Claimant immediately reported the accident to her supervisor and was ultimately referred to the company physicians at The Business and Industry Health Group, who treated claimant's shoulder and low back.

After several visits to the company physicians, claimant returned to work at light duty with the restriction that she was not to work in the cold. Claimant gave the restriction to her supervisor and upon her return was initially assigned to sit in the locker and lunch rooms. It appears claimant returned to work within a month of her accident. Both claimant and respondent's safety coordinator, David Bennett, testified they were not aware if The Business and Industry Health Group ever removed the restriction against working in a cold environment.

After approximately a month on light duty, respondent reassigned claimant to her regular job of straightening bacon on the packaging line. While performing this job, claimant could sit or stand as she desired, but would work in a refrigerated environment of thirty-eight to forty degrees (38-40°). Claimant testified she experienced significant pain when she returned to work and experienced problems with her upper arms, shoulders and lower back. Claimant decided to retire because of these problems and worked until January 1, 1993.

At her attorney's request, claimant was evaluated by Revis C. Lewis, M.D., on January 29, 1993. Dr. Lewis found limited range of motion in claimant's back and complaints of pain with certain movements. The doctor reviewed X-rays and a CT scan and found mild spurring in the lumbar vertebra and some bulging of the L5-S1 disc and to a lesser degree bulging of the L4-L5 disc. Dr. Lewis believes claimant sustained a soft tissue injury to the area of the left shoulder joint and a soft tissue injury to the low back which was discogenic in nature rather that ligamentous or muscular. As a result of her injuries, the doctor believes claimant has sustained a functional impairment of six to eight percent (6-8%) to the body for the low back injury and one to two percent (1-2%) functional impairment to the body for the left shoulder joint injury. Finally, Dr. Lewis believes claimant should observe the permanent work restrictions of no lifting more than fifteen (15) pounds on a regular basis or more than twenty-five (25) pounds more often than two (2) or three (3) times per hour, and that claimant should avoid repetitive bending and working in a cold environment. The doctor defines a cold environment as something approaching freezing.

In April 1993, claimant was examined and evaluated by orthopedic surgeon Gary Kramer, M.D. Dr. Kramer was unable to ascertain any objective musculoskeletal reason for claimant's complaints and did not reach a diagnosis. However, the doctor felt claimant was depressed and thought it would be useful for her to undergo a psychologic evaluation. Although Dr. Kramer believes claimant would have no functional impairment rating under the AMA standards and does not know of any reason why claimant could not perform sedentary work, he believes claimant thinks she cannot work for whatever reason and he believes her. The doctor believes no restrictions or limitations are warranted from an orthopedic standpoint. The Appeals Board notes the doctor did not look at X-rays other than those he took and did not know a CT scan had been performed.

Occupational therapist Jaye Cole also testified. Ms. Cole evaluated claimant on July 12, 1993 at Dr. Kramer's request. Although Ms. Cole thought claimant tested positive for symptom magnification, she does believe claimant was hurting during work hardening and was focused upon her pain. Although claimant may be experiencing symptom magnification, Ms. Cole believes claimant was only functioning at a sedentary level when she last saw her.

The Appeals Board agrees with the Administrative Law Judge that Dr. Lewis' testimony is the more persuasive because he had additional tests and information to consider that Dr. Kramer did not have. Although claimant was returned to work for the respondent, she was required to work in a cold environment in violation of her work restrictions. The Appeals Board finds the presumption of no work disability contained in K.S.A. 44-510e is not applicable for that period commencing January 1, 1993, when claimant left work because of the physical problems she was experiencing as a result of her accidental injury. However, for the period September 1, 1992 through December 31, 1992, the Appeals Board will apply the presumption of no work disability because claimant was working for the respondent earning a comparable wage.

Because she has sustained a "non-scheduled injury", claimant is entitled to permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. The statute provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

As indicated by the Administrative Law Judge, claimant has sustained a functional impairment of approximately ten percent (10%) as a result of her work-related injuries. Based upon the testimony of labor market expert Michael J. Dreiling, the Appeals Board finds claimant has lost approximately forty-five percent (45%) of her ability to perform work in the open labor market and fifty-two percent (52%) of her ability to earn a comparable wage when one considers the medical restrictions of Dr. Lewis. Mr. Dreiling believes all of claimant's previous jobs have been either sedentary or light and of an unskilled nature, and that claimant has now lost approximately one-half of the light jobs she could perform before the September 1992 accident. The Appeals Board finds Mr. Dreiling's failure to consider the fact claimant's personal physician had previously treated her for symptoms

of fibromyalgia, hypertension, and carpal tunnel is not significant because the record fails to establish that claimant had restrictions or limitations placed upon her for these conditions. Mr. Dreiling formulated his opinion regarding loss of ability to earn a comparable wage based upon his belief that claimant, post-injury, retains the ability to earn approximately $5.50 per hour. The Appeals Board concludes the claimant has lost fifty-two percent (52%) of her ability to earn a comparable wage comparing the $5.50 per hour to the $11.46 per hour hourly rate claimant was actually earning on the date of accident. In the Award, the Administrative Law Judge found claimant's average weekly wage to be $458.37. Because average weekly wage was not made an issue upon appeal, the Appeals Board adopts that finding as its own for purposes of this review.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, Rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average of the forty-five percent (45%) loss of ability to perform work in the open labor market and the fifty-two percent (52%) loss of ability to earn a comparable wage resulting in a forty-eight and one-half percent (48.5%) work disability which the Appeals Board considers to be an appropriate basis for the Award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert A. Foerschler, dated November 17, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Delta Gilmore, and against the respondent, a qualified self-insured, Swift-Eckrich, Inc., for an accidental injury which occurred September 1, 1992 and based upon an average weekly wage of $458.37, for 17.29 weeks permanent partial disability compensation at the rate of $30.56 per week or $528.38 for a 10% permanent partial general disability for the period September 1, 1992 through December 31, 1992, followed by 397.71 weeks permanent partial disability compensation at the rate of $148.21 per week or $58,944.60 for a 48.5% permanent partial general disability for the period commencing January 1, 1993, making a total award of $59,472.98.

As of July 25, 1995, there is due and owing claimant 17.29 weeks of permanent partial disability compensation at the rate of $30.56 per week in the sum of $528.38, followed by 133.71 weeks of permanent partial disability compensation at the rate of $148.21 per week in the sum of $19,817.163, for a total of $20,345.54 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $39,127.44 is to be paid for 264 weeks at the rate of $148.21 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders of the Administrative Law Judge as set forth in the Award dated November 17, 1994, that are not inconsistent with the findings and the order specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, Kansas
Mark E. Kolich, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
David A. Shufelt, Acting Director